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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 619

HENRY M. JUNG, JOHN H. JUNG, ARTHUR E. SERWICH, HEDRICH-BLESSING, LTD., an Illinois corporation, and GILBERT R. SHELTON, individually and as trustee under agreement dated July 21, 1952, *Petitioners*,

vs.

K. & D. MINING CO., INC., a corporation of the State of Washington, M. L. DAVIES (sometimes known as MYRON L. DAVIES), ALICE F. DAVIES, GEORGE C. KOSMOS, individually and as trustee, and YVONNE KOSMOS, *Respondents*.

RESPONDENTS' REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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THE ARGUS PRESS, SEATTLE

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Counsel for petitioners has misconceived the real basis for the ruling of the Circuit Court of Appeals of the Seventh Circuit on the motion to dismiss the appeal as not timely.

That court does not lay down an absolute rule to the effect that an order is final or appealable in all instances where leave is granted to amend and no action is taken within the time allowed for that purpose. It recognizes that there are cases in which it is necessary to enter another order where leave to amend is granted, although, as we shall show later, these are mainly cases in which further action was contemplated before a final order could be entered.

In the present case, petitioners had been granted leave to amend twice after sustaining a motion to dismiss for want of jurisdiction, and after the second motion was sustained, they waited nearly two years before taking any further action. The sole purpose of this evidently was to revive the action and fix a new date from which to measure the time for appeal, and the District Court inadvertently entered an order on March 25, 1957, dismissing the cause of action for the third time. Under the circumstances, the Court of Appeals properly took the view that petitioners had previously shown an intention to stand upon their complaint and that the District Court intended that its ruling should be final unless further action was taken within the time allowed.

In reaching its conclusion, the Circuit Court of Appeals applied the rule of reason to this situation in order to serve the ends of fairness and justice. The court said that there were two bases for the determination that the order was final, namely, the intent of the court and the action of the plaintiff. The court then said:

> "Rather than follow rigid procedural formality, it is our duty to determine the intent of the court below, as suggested in our decisions in both the *Stewart* and *Asher* cases. In so doing, the circumstances surrounding the appeal must be taken into consideration. First it is necessary to remember that one of the policy considerations for the 'final decision' rule is that of militating against piecemeal appeals. However, in the situation before us, where plaintiffs have failed to amend within the time granted and have taken no action for a period

of almost 22 months, it can hardly be correctly urged that to dismiss the appeal will amount to obstruction of that policy. This is true, even keeping in mind the policy of liberality of amendment prescribed by Rule 15 (a), to the effect that leave to amend shall be freely given when justice so requires, for, obviously, a reasonable time limit should always be imposed. [Citing cases.] Paralleling the impropriety of piecemeal appeals, we have the policy of finality of litigation, which would be frustrated by plaintiffs herein, if, merely by their inactivity and in spite of it, they should be allowed to give new life to a dormant action." (App. 10-A)

Following this the opinion states that plaintiffs failed to appeal from the order, which would have constituted an election by them to stand on the complaint, but pursued an opposite course, namely, refrained from taking any action whatever for an unreasonable period of time. It therefore sustained the contention that plaintiffs chose to treat the order of the court on May 27, 1955, as final, and consequently should be estopped from later action which would have the effect of reviving it.

It seems to us that the reasoning of the court as here set forth is sound and logical and the conclusion reached is certainly reasonable. There should be some finality to litigation and parties should not be heard to complain when they have slept upon what they regard as their rights for a wholly unreasonable length of time.

In the case of *Asher v. Ruppa*, 173 F.2d 10, the Court of Appeals for the Seventh Circuit said that when a motion to dismiss a complaint is sustained and the

complaint is dismissed, and the plaintiff does not desire to amend he should announce his election to stand on his complaint, let a final judgment be entered dismissing the cause of the action and then appeal from the judgment if he desires a review.

We think this is a reasonable view to take, and the logic of this situation is that if petitioners did not regard the order as final because leave to amend the complaint was granted, they should promptly have had an order entered making it clear that they intended to stand upon their complaint and then taken their appeal.

In view of what we have already said, we think it is useless to review all of the cases cited by the petitioners in their brief. None of them are like the present case where the single issue of jurisdiction in involved. In most of them, it was clear that further action was contemplated by the court regardless of what action the parties might take.

Thus in *Marconi Wireless Tel. Co. v. U.S.*, 320 U.S. 1, the Supreme Court simply held that where a patent case was held open pending an accounting the decision was not final.

In the case of *Clark v. Kansas City*, 172 U.S. 334, it was held that where the laws of Kansas permitted an amendment after overruling of a demurrer by the State Supreme Court and that court in deciding the case did not take the right away, the judgment of the state court was not final.

The case of *Cory Bros. & Co. v. U.S.*, 47 F.2d 607, is an old one decided in the second circuit in which ten days were given to amend and the court said that for aught

that appears the libelant may have amended its libed and may, should the amended libel be dismissed, hereafter appeal from that order. It therefore held that the order was not final and that a case may not be brought up in fragments. No such situation as that exists in the present case.

The case of *Fidelity Trust Co. v. Board of Education of the City of Chicago,* 174 F.2d 642, is cited as holding that where an order is interlocutory, the matter is *sub judice.* In that case, the Circuit Court held that a decree granting an injunction, but providing for reference to a master to take an accounting and to make findings was not a final decree since it contemplated further action by the court. That case is obviously not like the present one. There the court clearly intended to hold the case open pending the master's report, whereas in the present case, the District Court undoubtedly intended that the litigation should be terminated unless the complaint was amended within the time allowed.

In *Western Electric Co. v. Pacent Reproducer Corp.,* 37 F.2d 14 (CA-2), twenty days were allowed for amendment of the complaint and the appeal was taken within ten days. Under the circumstances, the court said that clearly the case remained pending in the District Court during the period in which amendment is permitted. However, the situation was such that a second appeal might have been taken, and the court therefore held that another order was necessary to terminate the litigation. The court further said that "subject to exceptions not here applicable, the rule is that a judgment, to be appealable, should be final not

only as to all parties, but as to the whole subject matter and all the causes of action involved." The judgment of dismissal entered by the lower court in the present case was final not only as to all parties, but as to the whole subject matter and all the causes of action involved.

The sole question before the court in this proceeding is that of jurisdiction of the United States District Court in Chicago, where the court held that it did not have jurisdiction and dismissed the complaint. See memorandum opinion (R. App. 37).

Notwithstanding the fact that the merits of the case were not considered by the District Court or Circuit Court of Appeals and are not here involved, counsel for the petitioners in the last paragraph on page 15 of the petition states:

> "The defendants have not been prejudiced in any way. They got the plaintiffs' money. The plaintiffs have the worthless securities. If the defendants wanted a final judgment entered earlier, *they* should have moved for judgment."

In view of this statement we trust it will not be deemed out of order for us to say that the defendants have not "got the plaintiffs' money." The money contributed by the individual parties to the corporation was expended in developing a mine which was a joint venture of the parties. If plaintiffs' securities are worthless, so are the securities held by the individual defendants, and there is no more reason why defendants should reimburse plaintiffs for their loss in this venture than there is why plaintiffs should reimburse defendants for their loss.

With reference to the last sentence above quoted, this may be paraphrased by saying that, if plaintiffs wanted a judgment entered earlier, and did not regard the one that was entered as final, they should have moved promptly for judgment, as the Court of Appeals suggested in the *Asher* case, *supra*.

In view of the foregoing, we think the Circuit Court of Appeals was justified in holding that the appeal was not filed in time and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL J. WETTRICK,
FLOYD F. SHIELDS,
Attorneys for Respondents.

December 13th, 1957.